Letchumanan a/l Gopal (representative for the estate of Rajammah a/p Muthusamy, deceased) v Pacific Orient & Co Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-04–114 OF 2005

ABDULL HAMID EMBONG, ABDUL MALIK ISHAK AND KANG HWEE GEE JJCA

14 APRIL 2011

C

Insurance — Recovery action — Denial of liability by insurer — Fatal accident — Passenger in lorry killed — Negligence of lorry driver — Action for damages by deceased's estate — Lorry owner held fully liable — Deceased not employee of lorry owner but freelance worker — Whether insurer could repudiate liability to pay under policy — Whether finding of liability in civil action prevented insurer from raising liability issue in recovery action

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E

A motor lorry insured by the respondent was involved in an accident in which a passenger ('the deceased') in the lorry was killed. A civil suit ('the liability action') filed in the sessions court found the owner of the lorry ('the company') 100% vicariously liable for the negligence of its driver in the accident and damages was awarded. The appellant then filed a recovery action in the same court to enforce the damages award against the respondent under s 96(1) of the Road Transport Act 1987 ('RTA'). The respondent repudiated liability to pay on the grounds the deceased was a mere passenger in the lorry and not an employee of the company. The respondent relied on an exception of the liability clause in its insurance policy that said the respondent would not be liable for the death of or bodily injury to any person 'other than a passenger carried by reason of or in pursuance of a contract of employment'. The sessions court allowed the appellant's claim but the High Court reversed the decision on appeal holding that under the exception clause the deceased was not in a contract of service with the company. The appellant appealed the decision to the Court of Appeal where it was argued, inter alia, that res judicata barred the respondent in a recovery action from re-litigating the issue of liability which had been determined in the liability action.

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Held, dismissing the appeal with costs:

I

(1) (per **Abdull Hamid Embong JCA**) The deceased was not under a contract of service with the company but a mere passenger. The respondent was thus not liable for his death (see para 13).

(2) (per **Abdull Hamid Embong JCA**) The deceased was merely a freelance

worker whose wages were paid by the cement purchaser at the destination where the cement bags were loaded off the motor lorry. He merely helped the driver unload the cement bags from the lorry and was paid on that basis. Apart from that, the company had no control over the deceased (see paras 10 & 11).

(3) (per **Abdull Hamid Embong JCA**) The liability and recovery actions were distinct from each other. The former was founded on tort, to determine negligence; the latter was based on a statutory right under the RTA which included the construction of the terms of the insurance policy and the application of s 91 and s 96 of the RTA. For this reason alone it was unjust to bar the respondent from raising afresh the issue of its liability even to the extent of adducing evidence on the same issue in the recovery action (see paras 20 & 21).

(4) (per **Abdull Hamid Embong JCA**) The respondent was not a party in the liability action. Thus a final determination of the issue of liability could not be said to have been made by the trial judge in the liability action (see para 22).

(5) (per **Abdull Hamid Embong JCA**) A dogmatic approach in applying the res judicata principle as a bar would be unjust to the respondent who did not have a full and fair opportunity to litigate the issue. This factor must be met before res judicata could be binding on the parties. It was founded on justice and common sense (see para 22).

(6) (per **Abdul Malik Ishak JCA**) What was raised by the respondent with regard to the construction of the insurance policy was not decided on its merits in the liability action. Being a live issue in the recovery action, the doctrine of res judicata should not apply (see para 57).

(7) (per **Abdul Malik Ishak JCA**) Since the appellant was a mere passenger in the motorlorry and not working for the company, the High Court was right in holding the respondent not liable in the recovery action (see para 49).

[Bahasa Malaysia summary

Sebuah motolori yang diinsuranskan oleh responden telah terlibat dalam kemalangan yang mana penumpang ('si mati') di dalam lori telah terbunuh. Satu guaman sivil ('tindakan liabliti') yang difailkan dalam mahkamah sesyen mendapati pemilik lori ('syarikat') adalah 100% bertanggungan secara vikarius bagi kecuaian pemandunya dalam kemalangan dan ganti rugi diawardkan. Perayu kemudiannya memfailkan tindakan mendapatkan balik di dalam mahkamah yang sama untuk menguatkuasakan award ganti rugi terhadap responden di bawah s 96(1) Akta Pengangkutan Jalan 1987 ('APJ'). Responden membatalkan liabiliti untuk membayar atas alasan bahawa si mati hanya penumpang lori dan bukan pekerja syarikat. Responden bersandarkan pada

pengecualian dalam klausa liabiliti dalam polisi insurans yang menyatakan bahawa responden tidak akan bertanggungan bagi kematian atau kecederaan diri ke atas mana-mana orang 'other than a passenger carried by reason of or in pursuance of a contract of employment'. Mahkamah sesyen membenarkan tuntutan perayu tetapi Mahkamah Tinggi mengakas keputusan rayuan bahawa di bawah klausa pengecualian, si mati tidak berkontrak servis dengan syarikat. Perayu merayu keputusan kepada Mahkamah Rayuan di mana menjadi pertikaian, antara lain, bahawa res judicata menghalang responden dalam tindakan mendapatkan balik dari menglitigasi semula isu liabiliti yang telah diputuskan dan tindakan liabiliti.

Diputuskan, menolak rayuan dengan kos:

(1) (oleh **Abdull Hamid Embong HMR**) Si mati tidak berada dalam kontrak servis dengan syarikat tetapi hanya seorang penumpang. Dengan itu, responden tidak bertanggungan ke atas kematiannya (lihat perenggan 13).

(2) (oleh **Abdull Hamid Embong HMR**) Si mati hanyalah seorang pekerja bebas yang gajinya dibayar oleh pembeli simen di tempat beg-beg simen diturunkan daripada motolori. Dia hanya menolong pemandu menurunkan beg-beg simen daripada lori dan dibayar berdasarkan itu. Selain itu, syarikat juga tiada kawalan terhadap si mati (lihat perenggan 10 & 11).

(3) (oleh **Abdull Hamid Embong HMR**) Tindakan liabiliti dan mendapatkan semula adalah berbeza daripada satu sama lain. Tindakan liabiliti adalah berasaskan tort, untuk menentukan kecuaian; tindakan mendapatkan semula adalah berasaskan daripada hak statutori di bawah APJ yang memasukkan pembentukan terma-terma polisi insurans dan pemakaian s 91 dan s 96 APJ. Untuk tujuan ini sahaja, adalah tidak adil untuk menghalang responden daripada membangkitkan isu liabilitinya walaupun hingga ke tahap mengemukakan bukti bagi isu yang sama dalam tindakan mendapatkan semula (lihat perenggan 20 & 21).

(4) (oleh **Abdull Hamid Embong HMR**) Responden bukan pihak dalam tindakan liabiliti. Dengan itu, suatu pemutusan akhir isu liabiliti tidak boleh dikatakan sebagai telah dibuat oleh hakim bicara dalam tindakan liabiliti (lihat perenggan 22).

(5) (oleh **Abdull Hamid Embong HMR**) Satu pendekatan dogmatik dalam menggunapakai prinsip res judicata sebagai halangan adalah tidak adil kepada responden yang tidak mempunyai peluang sepenuhnya dan adil untuk melitigasikan isu tersebut. Faktor ini mestilah dipenuhi sebelum res judicata boleh mengikat pihak-pihak. Ia berasaskan keadilan dan kenyataan munasabah (lihat perenggan 22).

(6) (oleh **Abdul Malik Ishak HMR**) Apa yang dibangkitkan oleh responden

berkaitan dengan pentafsiran polisi insurans tidak diputuskan atas merit dalam tindakan liabiliti. Sebagai isu utama dalam tindakan mendapatkan semula (recovery action), doktrin res judicata tidak boleh beraplikasi (lihat perenggan 57).

(7) (oleh **Abdul Malik Ishak HMR**) Oleh sebab perayu adalah penumpang lori sahaja dan bukan bekerja untuk syarikat, Mahkamah Tinggi adalah betul dalam memutuskan bahawa responden tidak bertanggung jawab dalam tindakan mendapatkan semula (lihat perenggan 49).

Editorial Note: This case supersedes the previous publication of the same in [2011] 4 MLJ 541.]

Notes

For a case on denial of liability by insurer, see 8(1) *Mallal's Digest* (4th Ed, 2011 Reissue) para 400.

Cases referred to

Amalgamated Society of Engineers, The v The Adelaide Steamship Company Limited and Others (1920) 28 CLR 129 (refd)

American International Assurance v Dato Lam Peng Chong & Ors [1999] 2 MLJ 547; [1999] 2 CLJ 771 (refd)

Bank Voor Handel En Scheepvaart NV v Slatford And Another [1953] 1 QB 248, CA (refd)

Barrow v Bankside Agency Ltd And Others [1996] 1 WLR 257 (refd)

Baines v State Bank of New South Wales [1985] 2 NSWLR 729 (refd)

Basser v Medical Board of Victoria [1981] VR 953 (refd)

Cassidy v Ministry of Health [1951] 2 KB 343 (refd)

Chamberlain v Deputy Commissioner of Taxation (1987–1988) 164 CLR 502 (refd)

Cole v Austin Distributors Ltd [1953] VLR 155 (refd)

Dr A Dutt v Assunta Hospital [1981] 1 MLJ 304; [1981] 1 LNS 5 (refd)

Employees Provident Fund Board v MS Ally & Co Ltd [1975] 2 MLJ 89, FC (refd)

Henderson v Henderson (1843) 3 Hare 100 (refd)

Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ 369; [1996] 4 CLJ 687 (refd)

Jackson v Goldsmith (1950) 81 CLR 446 (refd)

Kuala Lumpur Mutual Fund Bhd v J Bastian Leo & Anor [1988] 2 MLJ 526, SC (refd)

Lian Ann Lorry Transport & Forwarding Sdn Bhd v Govindasamy [1982] 2 MLJ 232, FC (refd)

Maganja v Arthur (t/a Shirley Arthur's Beauty Centre) (1984) 3 NSWLR 561 (refd)

Market Investigations Ltd v Minister of Social Security [1969] 2 WLR 1 (refd)

Melbourne Authority v Anshun Proprietary Limited (1980–1981) 147 CLR 589 (refd)
Menteri Sumber Manusia v John Hancock Life Insurance (Malaysia) Bhd & Another Appeal [2007] 1 ILR 274 (refd)
Park v Wilsons & Clyde Coal Company [1928] SC 121 (refd)
Performing Right Society, Limited v Mitchell and Booker (Palais de Danse), Limited [1924] 1 KB 762 (refd)
Pinnock Brothers v Lewis And Peat, Limited [1923] 1 KB 690 (refd)
Pople v Evans [1969] 2 Ch 255; [1968] 2 All ER 743, Ch D (refd)
Ramsay v Pigram (1967–1968) 118 CLR 271 (refd)
Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497 (refd)
Rogers v Legal Services Commission (SA) (1995) 64 SASR 572 (refd)
Short v J and W Henderson, Limited (1946) 62 TLR 427 (refd)
Stevenson Jordan and Harrison, Ltd v MacDonald and Evans [1952] 1 TLR 101 (refd)
Whittaker v Minister of Pensions and National Insurance [1967] 1 QB 156 (refd)
Yewens v Noakes (1880) 6 QBD 530 (refd)

Legislation referred to

Road Transport Act 1987 ss 91, 96, 96(1)

Appeal from: Civil Appeal No 12–29 of 2001 (High Court, Taiping)

Selvadoray a/l Thandanyan (T Selva & Co) for the appellants.
Lim Kim Guan (Hor Sook Yin with him) (Lim Him Wee & Co) for the respondents.

Abdull Hamid Embong JCA (delivering judgment of the court):

[1] On 30 January 1996, a road accident happened involving motorlorry No WT 1835 belonging to Syarikat Jagoh Angkat Sdn Bhd which was driven by one Katurajah a/l Subramaniam. Riding as a passenger with him was one Kanisan a/l Gopal ('the deceased'), who died in that accident. The motorlorry was insured by the respondent in this appeal (now referred to as P&O).

[2] A civil suit which we now refer to as the 'liability action' was filed at the Taiping Sessions Court, which after a full trial found the defendant, ie Kumpulan Jagoh Angkut Sdn Bhd to be 100% vicariously liable for the negligence of its driver Katurajah.

[3] Upon appeal against that decision, in the liability action, the High Court dismissed the appeal against liability but reduced the initial quantum of RM74,100 general damages and RM1599 as special damages to RM52,899.50.

[4] The appellant next filed a separate action, ie GS 52–97 of 2001 ('the recovery action') against P&O as the insurers. This recovery action was filed pursuant to s 96(1) of the Road Transport Act 1987 ('RTA'). P&O in its defence stated that the coverage is subject to the terms and condition of its insurance policy. It was P&O's case that the deceased was a mere passenger and not in the employment of Kumpulan Jagoh Angkut Sdn Bhd. The liability clause in the policy had stated that P&O shall not be liable in respect of:

> Death of or bodily injury to any person (*other than a passenger carried by reason of or in pursuance of a contract of employment.*) (Emphasis added.)

It was thus the firm stand of P&O that they cannot be liable pursuant to the exception as stated in the brackets above under the terms of the policy.

[5] On 26 October 2001, the sessions court allowed the appellant's claim under the recovery action.

[6] On appeal by P&O, the High Court reversed that decision and held that P&O cannot be liable in view of the exception to liability under the policy's terms.

[7] The learned High Court judge in coming to his decision to allow the appeal, considered the evidence adduced and found the deceased not to be a person who was in a contract of service with Kumpulan Jagoh Angkut Sdn Bhd. It was against this finding of facts by the appellate judge that this issue is now argued before us.

[8] The relevant passage of the High Court's decision is now reproduced. It says:

> Daripada keterangan SP3 adalah jelas bahawa si mati mempunyai pilihan sama ada mahu bekerja atau tidak. Pemandu lori tidak boleh memaksa si mati mengikutinya sekiranya si mati tidak mahu. Si mati sendiri yang menentukan sama ada ia hendak mengikut pemandu lori tersebut. Menurut SP3 pengangkut simen adalah pekerja bebas (free lance). Mereka datang bekerja mengikut kehendak hati mereka. Pemandu akan hanya mengambil mana-mana pekerja yang menawarkan khidmat mereka. Pemandu menawarkan kerja kepada mereka dan terpulang kepada pengangkut simen ini hendak menerima atau menolak tawaran tersebut.
>
> Pengambil insurans tidak mengawal cara mana si mati perlu melakukan kerjanya. Hal ini ditentukan oleh pembeli simen yang fnembayar upah si mati. Majikan si mati ialah pembeli simen.

[9] The High Court also considered the four indicia for a contract of service to exist as laid down by the Federal Court in *Employees Provident Fund Board v*

MS Ally & Co Ltd [1975] 2 MLJ 89 in determining whether, on the facts, the deceased was truly one within Kumpulan Jagoh Angkut Sdn Bhd's contract of service. These are:

(i) The master's power of selection of his servant,

(ii) The payment of wages or other remuneration,

(iii) The master's right to control the method of doing the work, and

(iv) The master's right of suspension or dismissal.

[10] We have critically perused the evidence led especially that of SD2, SP3 and SP2 and find ourselves in agreement with the High Court in deciding that the deceased was not in a contract of service of Kumpulan Jagoh Angkut Sdn Bhd. Most telling is the evidence of SP2, who stated that there would always be a group of persons outside the cement factory waiting to be employed. SP2 said this:

> Ada sekumpulan orang berkumpul di luar kilang berdekatan dengan kedai kopi menunggu mana-mana m/lori yang perlukan khidmat mereka untuk turunkan kampit beg-beg simen di destinasi.

According to uncontradicted evidence of SD2, the wages of the deceased would be paid by the cement purchaser at the destination where the cement bags are loaded off the motorlorry.

In short, these persons' employment was just a temporary ad hoc arrangement. They, including the deceased were merely freelance workers.

[11] It may be observed at this juncture that in the trial of the liability action no specific finding was made by the sessions court whether the deceased was either 'employed' by the driver or was an independent contractor. Be that at it may, we are satisfied from the evidence that the deceased was merely one who helped the driver to unload the cement bags from the lorry and was paid on that basis only. Apart from that, the driver's employer, ie Kumpulan Jagoh Sdn Bhd had no control, a factor, which we say is a relevant consideration, over the deceased as was correctly found by the High Court. We quote two passages from two authorities in determining this issue. In *American International Assurance v Dato Lam Peng Chong & Ors* [1999] 2 MLJ 547; [1999] 2 CLJ 771, this court has stated that:

> A person is a workman if he is engaged under a contract of service. But he is an independent contractor and not a workman if his engagement is pursuant to a contract for services.

The Supreme Court in *Kuala Lumpur Mutual Fund Bhd v J Bastian Leo & Anor* [1988] 2 MLJ 526, said this of control of a workman in one's employment:

A The degree of control exercised by one person over another is always a relevant consideration in determining whether a contract of service exist between them.

[12] The modern test in determining if one is under a contract of service seems to be dependent on whether the person is part and parcel of an organisation, in other words, whether the person is employed as part of the business — (see *Bank voor Handel en Scheepvaart NV v Stratford* [1953] 1 QB 248)

[13] Having considered the evidence we are of the view that the deceased was not under a contract of service of Kumpulan Jagoh Angkut Sdn Bhd. We thus affirm the finding of the High Court on this issue; that the deceased was then a mere passenger, not under such a contract of employment. P&O could thus not be liable for his death.

[14] The second issue raises a point of law which may be stated in this manner:

Whether in the recovery action the question of liability of the tortfeasor which has been determined in the liability action may still be raised and argued to entitle the insurer to refuse satisfying the judgment.

[15] Learned counsel for the respondent had argued against the relitigation on the liability issue and that the doctrine of res judicata is applicable as a bar.

[16] The appellants' counsel on the other hand, pointed out that the High Court in the recovery action had observed that the sessions court merely made a finding that the deceased was a passenger. There was no determination made below if the deceased was an employee to be covered under the policy.

[17] So, is res judicata applicable to bar the issue of liability from being raised again, this time by the insurer?

[18] Literally translated, res judicata, is 'the fact has been decided'. It expresses a general public interest policy that the same issue (or cause of action) should not be litigated more than once even if the parties are different. It prevents vexatious litigation and any abuse of the courts' process on the premise that final judgments are binding and conclusive (see *Henderson v Henderson* (1843) 3 Hare 100). The criminal law equivalent is the doctrine of double jeopardy.

[19] It is in the broader sense of res judicata that the appellant submitted that

the liability issue should now be precluded from being raised at the recovery stage since it has been adjudged in the previous liability action.

[20] It is our view that the liability and recovery actions are distinct from each other. The former is a claim founded on tort whereas the latter is based on a statutory right provided under the provisions of the RTA. For this reason alone it would be unjust to bar the insurers from raising afresh the issue of its liability even to the extent of adducing evidence on the same issue at the recovery action stage.

[21] In the liability action, the issue before the court would be to determine negligence whereas in the recovery action the issues include the construction of the terms in the insurance policy and the application of ss 91 and 96 of the RTA. It is upon this construction of the insurance policy that the insurers raised for the first time in the recovery action. In this appeal, P&O, as the insurers is thus seeking to declare that the policy as against the deceased, is unenforceable due to the exception in its terms. This issue remains alive and was brought up on appeal to the High Court and now before us.

[22] It needs to be mentioned that P&O was not a party in the liability action. Thus, a final determination of this issue cannot be said to have been made by the trial judge in the liability action. A dogmatic approach applying the res judicata principle as a bar would be most unjust to P&O who does not have a full and fair opportunity to litigate the issue. This factor must be met before res judicata can be binding on the parties. It is founded on justice and common sense.

[23] For these reasons, we would dismiss this appeal with costs fixed at RM10,000 to the respondent.

Abdul Malik Ishak JCA:

INTRODUCTION

[24] I have read the well written judgment of my learned brother Abdull Hamid bin Embong JCA and I gratefully adopt the facts narrated by him and the law applied by him in this supporting judgment.

[25] The liability action that was heard and decided by the Taiping Sessions Court went up straight on appeal to the High Court where the appeal against liability was dismissed and Kumpulan Jagoh Angkut Sdn Bhd – the owner of the motor lorry No WT 1835, was held to be vicariously liable for the negligence of its driver by the name of Katurajah a/l Subramaniam. This paved

the way for the appellant — the deceased passenger of the said motor lorry, to file a recovery action pursuant to s 96(1) of the Road Transport Act 1987 ('RTA') against Pacific Orient & Co Sdn Bhd ('P&O') as the insurers in the sessions court vide Guaman Sivil No 52–97 of 2001. The sessions court allowed the appellant's claim in the recovery action. Aggrieved by that decision, P&O appealed to the High Court. In due course, the High Court reversed the decision of the sessions court in the recovery action and held that P&O cannot be held liable. Aggrieved, the appellant now appeals to this court.

ANALYSIS

[26] Section 96(1) of the RTA imposes a duty on the part of the insurers to satisfy judgments against persons insured in respect of third party risks. If the insurers refuse to satisfy the judgments, then the plaintiffs — be it the dependants or injured victims of the tortfeasors' negligence, have a legal right under s 96(1) of the RTA to file a writ against the insurers.

[27] Section 96(1) of the RTA must be construed literally by looking at the language employed by Parliament and giving it its ordinary and natural sense. This is the literal approach and it has been explained by Higgins J in *The Amalgamated Society of Engineers v The Adelaide Steamship Company Limited And Others* [1920] 28 CLR 129, at pp 161–162, in this way:

> The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result to be inconvenient or impolitic or improbable.

[28] At this juncture, it is ideal to reproduce s 96(1) of the RTA. It reads as follows:

> Duty of insurers to satisfy judgements against persons insured in respect of third party risks
>
> 96
>
> (1) If, after a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, judgement in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgement any sum payable in respect of the liability, including any amount payable in respect of

costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgements.

[29] And it allows a party who has no contractual relationship with the insurers and who has no claim in tort against the insurers to file a suit against the insurers. However, s 96(1) of the RTA cannot be read in isolation. It must be read with s 91 sub-s (1)(a) and sub-s (1)(b) of the RTA and they are worded as follows:

Requirements in respect of policies

91

(1) In order to comply with the requirements of this Part, a policy of insurance must be a policy which —

(a) is issued by a person who is an authorized insurer within the meaning of this Part; and

(b) insures such person, or class of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road:.

[30] In plain language, it means that for a motor vehicle insurance to be valid, the policy must be issued by a licensed insurance company and it must cover 'such person, or class of persons as may be specified in the policy in respect of any liability which may be incurred' by those persons which result in death or bodily injuries to other persons arising out of the use of the motor vehicle. Thus, the obligation of the insurers to pay judgments under s 96(1) of the RTA will only arise if it can be shown that the tortfeasors are persons that fall within the class of persons covered by the policy.

[31] P&O's defence was quite simple. It was this: that the exception to the liability clause in the insurance policy categorically stated that P&O shall not be liable in respect of (see p 62 of the appeal record):

(iii) death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon or entering or getting on to or alighting from the Motor Vehicle at the time of the occurrence of the event out of which any claim arises.

[32] Now, since the appellant was a mere passenger in the motor lorry No WT 1835 and not working for Kumpulan Jagoh Angkut Sdn Bhd, the High Court was right in holding that P&O cannot be held liable in the recovery action filed by the appellant. There was no contract of service between the appellant and Kumpulan Jagoh Angkut Sdn Bhd.

[33] A contract of service will give rise to an employer and employee relationship. It is a contract made between an employer and an employee. Thus, if a tort is committed by an employee in the course of his employment, the employer will be liable for any injury or damage to third parties. In *Cassidy v Ministry of Health* [1951] 2 KB 343(CA), where a resident surgeon of a hospital negligently performed an operation on the plaintiff, it was held that the hospital authority, being the employer, was liable.

[34] Salleh Abas FJ (as he then was) in *Lian Ann Lorry Transport & Forwarding Sdn Bhd v Govindasamy* [1982] 2 MLJ 232, at p 234 aptly said:

> In our view, the duration and nature of an employment, be it temporary or permanent, is immaterial for the purpose of determining the existence of a contract of service. As long as there exists a relationship of a master and servant or that of an employer and employee, the law will infer a contract of service existing between them, notwithstanding the fact that the service or the employment is intended by the person in the position of master to be temporary or of a short duration only.

[35] Lord Denning LJ in *Stevenson Jordan and Harrison, Ltd v MacDonald and Evans* [1952] 1 TLR 101 (CA), at p 111 stated that:

> It is often easy to recognise a contract of service when you see it, but difficult to say wherein the difference lies.

[36] Lord Wedderburn in 'The Worker and the Law', (3rd Ed), (London: Sweet and Maxwell, 1986) at p 116 aptly said that:

> ... the contract of employment (referring to the contract of service) has become 'an animal' too difficult to define but easy to be recognised when you see it.

[37] It is germane to mention that the relationship between an employer and an employee is a mixed question of fact and law (*Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304; [1981] 1 LNS 5 (FC); *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369; [1996] 4 CLJ 687 (FC); and *Menteri Sumber Manusia v John Hancock Life Insurance (Malaysia) Bhd & Another Appeal* [2007] 1 ILR 274 (CA)). At the end of the day, it is the court that has to construe the contract as a whole in order to determine the true nature of the relationship between the parties. The Federal Court in *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* aptly stated (at pp 382 - 383(MLJ); p 702(CLJ)):

> With respect, the capacity in which one is employed or the purpose of the employment does not answer the question at hand. It may be, as was the case of Gray, that the purpose of Inchcape employing him was to run the whole of the affairs of a subsidiary. But that fact in itself would not exclude him from being a workman.

Take the case of a company with several autonomous departments within it. A man may be employed as the head of a particular department with carte blanche powers. He would then have sole control over all and sundry who are subordinate to him in that department. He may also be given the artificial designation of 'director' without being a member of his employer's Board. But, vis-á-vis the company who employs him, he would still be its workman.

Again, take the illustration that was put to counsel during argument. Assume for a moment that an employer appoints his chauffeur as a director of one of his companies to hide his own involvement in it. The contract may provide that he is to be engaged as a director of the particular company. That is the purpose intended by the contract. One may find cheques and resolutions signed by him. Yet in truth, all that he does is to drive his employer to and from work. So one may find a case where the purpose of employment, namely, as a director, disclosed in the contract to be quite different from the duties actually performed.

In the course of the discussion of this illustration, counsel had perforce to concede that, in respect of the example given, the director would be a workman. This shows the true principle: that it is the functions of and the duties actually discharged by the particular claimant that is important and not merely the label that is attached to the particular employment or indeed the purpose of the engagement.

[38]
In the common law regime, a number of tests have been formulated in order to differentiate between a contract of service and a contract for services. What immediately comes to mind is the *control test* that was introduced way back in the 19th century. A classic example would be the case of *Yewens v Noakes* (1880) 6 QBD 530 (CA), where the *control test* was propounded in this manner: that if the employer can direct a person not only what to do but also how to do it, then there exists a contract of service. In this connection, it is also ideal to refer to the case of *Performing Right Society, Limited v Mitchell and Booker (Palais de Danse), Limited* [1924] 1 KB 762.

[39] According to MacKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497, at p 515, a contract of service would come into existence when the employee agrees either expressly or impliedly that in the performance of his service he is subjected to the control of the other party in a sufficient degree in order to make the other party an employer. Now, control must necessarily include the power of deciding the thing to be done as well as the way in which it shall be done.

[40] But, the *control test* according to Somervell LJ in *Cassidy v Ministry of Health* may not be a decisive factor. In that case, His Lordship made reference to the case of a certified master of a ship. According to His Lordship, the master may be employed under a contract of service and the owner of the ship can tell him where to go, but the owner has no power to tell the master how to navigate the ship.

[41] The next test to consider is the *organisation test.* This was propounded by Lord Denning LJ in the case of *Bank Voor Handel En Scheepvaart NV v Slatford And Another* [1953] 1 QB 248 (CA), at p 295, by way of an obiter. This was what Lord Denning LJ said:

> In this connexion I would observe that the test of being a servant does not rest nowadays on submission to orders. It depends on whether the person is part and parcel of the organisation:....

[42] However, MacKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* commented on the *organisation test* in this way (see p 524):

> This raises more questions than I know how to answer. What is meant by being 'part and parcel of an organisation'? Are all persons who answer this description servants? If only some are servants, what distinguishes them from the others if it is not their submission to orders? Though I cannot answer these questions I can at least invoke the dictum to support my opinion that control is not everything.

[43] The next test is the *integration test.* This test was laid out in *Whittaker v Minister of Pensions and National Insurance* [1967] 1 QB 156. In that case, a trapese artiste who performed trapese acts and who was also an usherette for a circus was held to be employed under the contract of service because her duties were an integral part of the business of the circus.

[44] The *entrepreneur test* is another test to reckon with. In the words of Cooke J in *Market Investigations Ltd v Minister of Social Security* [1969] 2 WLR 1, at pp 9–10:

> ... the fundamental test to be applied is this: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?' If the answer to that question is 'yes', then the contract is a contract for services. If the answer is 'no', then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task.

[45] The modern employment scenarios are not getting simpler. They are now far too complex. Lord Thankerton in *Short v J and W Henderson, Limited*

(1946) 62 TLR 427 (HL), at p 429 approved the four indicia of a contract of service that was first mentioned in *Park v Wilsons & Clyde Coal Company* [1928] SC 121 at p 134. My learned brother Abdull Hamid bin Embong JCA also alluded to the fact that the High Court had correctly applied the four indicia of a contract of service and I do not propose to say anything more on the same point.

[46] When one talks about a contract for services, one would naturally bring into sharp focus the idea of an independent contractor who provides services for another party. An independent contractor is self-employed and it is concerned with contracts to provide services for another party.

[47] An independent contractor is always under the control of his employer as to what he must do. But the employer cannot control the actual manner in which he does the work. He is free to decide as to the method of doing the work. In short, independent contractors are said to work under a 'contract for service'.

[48] *Halsbury's Laws of England*, (3rd Ed), Vol 25 at p 452 described the distinction between a contract of service and a contract for service in this way:

> In general the distinction between a contract of service and a contract for work and labour or for services is similar to that which exists between a contract of service and contract of agency, namely, that in the case of a contract of service the master not only directs what work is to be done but also controls the manner of doing it, whereas, in the case of a contract for work and labour or a contract for services the employer is entitled to direct what work is to be done, but not to control the manner of doing it.

[49] A final issue to consider is in regard to the doctrine of res judicata. It is correct to say that the insurers P&O raised for the very first time the issue of the construction of the insurance policy in the recovery action bearing in mind that P&O was not a party in the liability action. P&O is entitled, in this appeal, to seek a declaration that the insurance policy does not cover the deceased who was a mere passenger in the motorlorry No WT 1835. It is a live issue before this court and it was also a live issue before the High Court. The doctrine of res judicata cannot be invoked against P&O in this appeal.

[50] According to Yeldham J in the case of *Maganja v Arthur (t/a Shirley Arthur's Beauty Centre)* (1984) 3 NSWLR 561, at p 564, that a res judicata only arises from a judgment on the merits. And no estoppel arises from a final order which is not a judgment.

[51] It is pertinent to point out that no estoppel arises from:

(a) a verdict not followed by a judgment (*Basser v Medical Board of Victoria* [1981] VR 953, at p 976);

(b) acceptance of a sum paid into court (*Cole v Austin Distributors Ltd* [1953] VLR 155, at p 158);

(c) dismissal of an action for want of prosecution (*Pople v Evans* [1969] 2 Ch 255; [1968] 2 All ER 743);

(d) failure to comply with a self-executing order (*Baines v State Bank of New South Wales* [1985] 2 NSWLR 729, at p 738);

(e) lack of jurisdiction (*Pinnock Brothers v Lewis And Peat, Limited* [1923] 1 KB 690, at p 696); and

(f) for failure to disclose a cause of action (*Rogers v Legal Services Commission (SA)* (1995) 64 SASR 572, at p 593).

[52] It is trite law that res judicata prevents the re-agitation of the same cause of action in later proceedings (*Jackson v Goldsmith* (1950) 81 CLR 446, at p 447; and *Ramsay v Pigram* (1967—1968) 118 CLR 271, at p 280).

[53] Brennan J in Port of *Melbourne Authority v Anshun Proprietary Limited* (1980—1981) 147 CLR 589, at p 611 said that the phrase 'res judicata' is used to refer to:

(a) the series of facts which the plaintiff must allege and prove to substantiate a right to judgment;

(b) the legal right which has been infringed; and

(c) the substance of the action, as distinct from its form.

[54] But the majority in *Chamberlain v Deputy Commissioner of Taxation* (1987—1988) 164 CLR 502, at p 508, made reference to that trichotomy as mentioned by Brennan J in Anshun but Their Lordships did not advocate any one of the three forms.

[55] Sir James Wigram VC in *Henderson v Henderson* (1843) 3 Hare 100, at pp 115–116; 67 ER 313, at pp 319–320, stated the res judicata rule in this way. That the court:

> requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case.

> The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.... It is plain that litigation would be interminable if such a rule did not prevail.

[56] According to Sir Thomas Bingham MR in *Barrow v Bankside Agency Ltd And Others* [1996] 1 WLR 257 (CA), at p 260:

> The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever and that a defendant should not be oppressed by successive suits when one would do.

[57] All these authorities are certainly thought provoking. In the context of the present appeal, what was raised by P&O in regard to the construction of the insurance policy was not decided on its merits in the liability action by the sessions court. Being a live issue in the recovery action, the doctrine of res judicata should not apply.

[58] I agree with my learned brother Abdull Hamid bin Embong JCA that the appeal should be dismissed with costs, as agreed, at RM10,000 to the respondent. The deposit too should go to the respondent as part of the costs.

Appeal dismissed with costs.

Reported by Ashok Kumar